

CERTIFIED FOR PARTIAL PUBLICATION¹
COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES E. WESTBROOKS,

Defendant and Appellant.

D048175

(Super. Ct. No. SCD195091)

APPEAL from a judgment of the Superior Court of San Diego County, Laura P. Hammes, Judge. Affirmed.

Patricia L. Brisbois, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Mary Jo Graves, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Peter Quon and Pat Zaharopoulos, Deputy Attorneys General, for Plaintiff and Respondent.

¹ Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of part III.B.

I.

INTRODUCTION

A jury found James E. Westbrooks guilty of selling a controlled narcotic substance, cocaine base (Health & Saf. Code, § 11352, subd. (a)) (count 1). The jury also found that Westbrooks sold cocaine base within the meaning of Penal Code section 1203.073, subdivision (b)(7).² After the jury returned its verdict, Westbrooks admitted that he had served two prior terms in prison and that he had suffered a prior strike conviction. The trial court sentenced Westbrooks to eight years in prison, after striking the two prison priors and doubling the middle term of four years based on his strike prior.

On appeal, Westbrooks claims that by instructing the jury pursuant to CALCRIM No. 220, the trial court violated his due process right to have his guilt determined beyond a reasonable doubt. Westbrooks argues that the instruction improperly informed the jury that it could not consider the lack of physical evidence implicating him in the crime in determining whether the People met their burden of proving him guilty beyond a reasonable doubt. Westbrooks also claims that the trial court erred in refusing to strike his prior strike conviction.³ We affirm the judgment.

² Unless otherwise specified, all subsequent statutory references are to the Penal Code.

³ We consider this contention in the unpublished portion of this opinion.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*

1. *The People's evidence*

On November 17, 2005, at approximately 5:00 p.m., San Diego Police Detective Jesse Zaldivar was working undercover in the area of 15th and J Streets looking for potential drug dealers from whom to purchase cocaine base. Detective Zaldivar was wearing a "body wire," or one-way transmitter, that allowed him to transmit audio signals to other police officers who were monitoring his activities.

Detective Zaldivar saw a man wearing a red jacket and black sweatpants with a yellow stripe, later identified as codefendant Melvin Mitchell. Detective Zaldivar asked Mitchell if Mitchell was selling cocaine base and told Mitchell that he was looking to buy \$20 worth of cocaine base. Mitchell told Zaldivar to follow him. Mitchell and Zaldivar walked about 30 feet, until they encountered a man later identified as Westbrook. Mitchell asked Westbrook if he had \$20 worth of cocaine base. Mitchell told Westbrook that Zaldivar was a friend.

Westbrook asked Zaldivar if he was a police officer, and Zaldivar replied that he was not. Westbrook reached into the right pocket of his shorts and pulled out a piece of plastic that contained an off-white "rocklike" substance. Westbrook took a single piece

of the rocklike substance and placed it in Zaldivar's hand. Zaldivar then gave Westbrooks a \$20 bill.⁴

San Diego Police Officer Vernon Peterson, who was monitoring Zaldivar's activities, heard Zaldivar give a signal over the wire indicating that he had purchased a controlled substance. Officer Peterson informed other police officers, who were responsible for arresting the suspects, of the completed transaction.

After the sale, Westbrooks walked northbound. Detective Zaldivar walked with Mitchell about 20 feet, until police officers in two marked patrol cars drove up next to Zaldivar and Mitchell. One officer stopped his vehicle and detained Mitchell. Detective Zaldivar pointed north, to advise the second officer, San Diego Police Officer Jose Chavez, of Westbrooks's whereabouts. Officer Chavez continued driving in an attempt to locate Westbrooks. Moments later, Zaldivar got into another police car that was being driven by Sergeant Griffin. Detective Zaldivar broadcast a description of the suspect to the arrest team over the police radio. Zaldivar stated that the suspect was a black male wearing a black t-shirt and black shorts.

Officer Chavez heard the radio broadcast describing Westbrooks.⁵ After driving a few blocks, Officer Chavez saw Westbrooks and arrested him. Sergeant Griffin drove Zaldivar to the location of Westbrooks's arrest. Within three minutes of the original

⁴ The parties stipulated that the substance sold was cocaine base weighing 0.27 grams.

⁵ Officer Chavez testified that he "believed" that the broadcast came from Sergeant Griffin.

purchase, Detective Zaldivar identified Westbrook as the person who had sold him the cocaine base.

Officer Chavez searched Westbrook, but did not find any \$20 bills or any rock cocaine. Officer Chavez searched the area, but found no additional evidence.

2. Defense evidence

Heirrieze Arnwine, a certified addiction treatment specialist and a friend of Westbrook's wife, testified that she had agreed to meet with Westbrook at a program called the Lighthouse at 5:30 p.m. on the evening of November 17, 2005. The Lighthouse is a residential treatment program for male parolees, and is located in the area where Westbrook was arrested. Westbrook did not show up for their scheduled meeting.

Dr. Thomas MacSpeiden, a forensic psychologist, testified as an expert regarding eyewitness identification. MacSpeiden discussed factors that are known to affect the accuracy of an eyewitness's identification, including stress and the presence of a weapon. MacSpeiden also testified that police officers are, in general, no more able to identify a face than are other persons.

3. Rebuttal evidence

Detective Zaldivar testified that he took steps to ensure that he would be able to correctly identify Westbrook, including describing him to other police officers over the wire he was wearing and confirming Westbrook's identity approximately two and a half minutes after he purchased the rock cocaine. Detective Zaldivar testified that there was no weapon directed at him during the purchase and that at the time of the purchase, he

was not experiencing stress that might prevent him from being able to identify the person who had sold him the drugs.

B. *Procedural Background*

In December 2005, the People filed an information against Westbrook and codefendant Mitchell. The People charged Westbrook with selling a controlled narcotic substance, cocaine base (Health & Saf. Code, § 11352, subd. (a)) (count 1), and possessing cocaine base for sale (Health & Saf. Code, § 11351.5) (count 2). With respect to count 1, the People alleged that Westbrook had sold cocaine base within the meaning of section 1203.073, subdivision (b)(7). With respect to both counts, the People alleged that Westbrook had suffered a prior conviction within the scope of Health and Safety Code section 11370, subdivision (a).⁶

The People further alleged that Westbrook had suffered three felony convictions within the meaning of section 1203, subdivision (e)(4), that he had served two prior prison terms within the meaning of sections 667.5, subdivision (b) and 668, and that he had suffered a prior strike conviction within the meaning of sections 667, subdivisions (b) through (i), 1170.12 and 668.

A jury found Westbrook guilty of selling a controlled narcotic substance, cocaine base (Health & Saf. Code, § 11352, subd. (a)) (count 1). The jury also found that he had sold cocaine base within the meaning of section 1203.073, subdivision (b)(7). In

⁶ Section 1203.073 and section 11370 limit the granting of probation when a defendant has been convicted of various enumerated offenses.

accordance with the court's instructions, the jury returned the verdict form as to count 2 unsigned.⁷

At sentencing, the trial court struck Westbrook's two prison priors. The court sentenced Westbrook to eight years in prison, consisting of the middle term of four years on count 1, doubled because of Westbrook's strike prior.

III.

DISCUSSION

A. *The trial court did not violate Westbrook's due process right to have his guilt determined beyond a reasonable doubt by instructing the jury pursuant to CALCRIM No. 220*

Westbrook claims the trial court violated his due process right to have his guilt determined beyond a reasonable doubt in instructing the jury pursuant to CALCRIM No. 220. Westbrook argues that the instruction improperly "limited the jury's determination of reasonable doubt to the evidence *received* at trial and precluded it from considering the lack of physical evidence tying [him] to the offense, namely the marked \$20 bill and the other 'ten-plus' pieces of crack cocaine . . . possessed by the seller." Westbrook claims that his trial counsel provided ineffective assistance of counsel by failing to object to the instruction.

"The independent or de novo standard of review is applicable in assessing whether instructions correctly state the law" (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

⁷ The court had previously instructed the jury that count 2 was a "lesser offense" of count 1.

1. *Factual and procedural background*

During the trial, Officer Chavez testified that he searched Westbrook after he arrested him. Officer Chavez said that he did not find any \$20 bills or any rock cocaine in Westbrook's possession or in the immediate area.

During closing arguments, both the prosecutor and defense counsel referred to the fact that Westbrook did not have the marked \$20 bill or rock cocaine in his possession when he was arrested. The prosecutor stated:

"I've had a lot of difficulty in deciding how to argue this because the fact that the handful of rocks and the marked 20 is missing, I have lost just pieces of additional evidence, 'cause, remember, having the marked 20 there is circumstantial evidence [that] you [have] got the right guy or direct or circumstantial [*sic*]. If you got the marked 20, it just makes the case stronger. If you catch them holding a fistful of more drugs, it just makes the case stronger.

"I don't need it. I don't need it here. It would have been nice. And the fact that it doesn't exist is why we're in trial today. I don't need it."

Defense counsel argued that Westbrook "did not have the money because they arrested the wrong guy." Defense counsel also stated, "There was no evidence of drugs or money on Mr. Westbrook nor was any found in his immediate area." Defense counsel also argued, "Lack of evidence means reasonable doubt. . . . [¶] No drugs . . . No money."

The trial court instructed the jury pursuant to a modified version of CALCRIM No. 220 as follows:

"The fact that a criminal charge has been filed against the defendant is not evidence that the charge is true. You must not be biased

against the defendant just because he has been arrested, charged with a crime, or brought to trial.

"A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove each element of a crime and special allegations beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt.

"Proof beyond a reasonable doubt is proof that leads — leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

"In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty."

The court instructed the jury pursuant to CALCRIM No. 222 in relevant part as follows: "You must decide what the facts are in this case. You must use only the evidence that was presented in this courtroom . . . the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I told you to consider as evidence"

The trial court also instructed the jury, "You must decide whether a fact in issue has been proved based on all the evidence." (CALCRIM No. 223.) In addition, the court instructed the jury that the "People have the burden of proving beyond a reasonable doubt that it was the defendant who committed the crime" (CALCRIM No. 315), and that Westbrooks could "rely on the state of the evidence and argue that the People have failed to prove the charges beyond a reasonable doubt." (CALCRIM No. 355.) The court also

instructed the jury that "the People must prove" each element of the charged offense. (CALCRIM No. 2300.)

During deliberations, the jury sent the court a note that stated, "We would like more clarification on a definition of reasonable doubt. We have read the instructions but would like a little more interpretation of reasonable doubt."

After discussing the note with counsel, the trial court responded, "This is the standard definition given in all criminal cases. Courts are discouraged from expanding on the definition. Please consider each word carefully and apply a common sense meaning to the terms. Thank you for your question."⁸

2. *Governing law*

"The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364.) Pursuant to the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitutions, "The prosecution bears the burden of proving all elements of the offense charged . . . and must persuade the factfinder 'beyond a reasonable doubt' of the facts necessary to establish each of those elements. . . ." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278.)

Reasonable doubt may arise from the evidence presented at trial or the "lack of evidence." (*Johnson v. Louisiana* (1972) 406 U.S. 356, 360; accord *People v.*

⁸ The clerk's transcript states that the court's response was "agreed to by counsel."

Simpson (1954) 43 Cal.2d 553, 566 ["The reasonable doubt prescribed by [former section 1096]⁹ may well grow out of the lack of evidence in the case as well as the evidence adduced"].)

In *Victor v. Nebraska* (1994) 511 U.S. 1 (*Victor*), the United States Supreme Court considered whether jury instructions defining reasonable doubt in two criminal cases violated due process. The *Victor* court began its analysis by stating:

"The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course. [Citation.] Indeed, so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, [citation], the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. [Citation]. Rather, 'taken as a whole, the instructions [must] correctly convey the concept of reasonable doubt to the jury.' [Citation.]." (*Id.* at p. 5.)

⁹ Section 1096 provides: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his or her guilt is satisfactorily shown, he or she is entitled to an acquittal, but the effect of this presumption is only to place upon the state the burden of proving him or her guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: 'It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.'" Section 1096 was amended in 1995 in ways not material to this issue.

The commentary to CALCRIM No. 220 states, "This instruction is based directly on Penal Code section 1096."

In rejecting the defendants' arguments that the reasonable doubt instructions at issue in *Victor* were unconstitutional, the court stated, "There is no reasonable likelihood that the jurors who determined petitioners' guilt applied the instructions in a way that violated the Constitution." (*Victor, supra*, 511 U.S. at pp. 22-23.)

3. *The trial court did not err in instructing the jury pursuant to CALCRIM No. 220*

Westbrooks claims that there is a reasonable likelihood that the jurors interpreted CALCRIM No. 220 as prohibiting them from considering the lack of physical evidence implicating him in the crime, in determining his guilt. Westbrooks places particular emphasis on the following sentence in CALCRIM No. 220, "In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial." He notes that CALCRIM No. 222 generally defines evidence as the testimony and exhibits offered at trial.

The sentence to which Westbrooks objects, like the remainder of CALCRIM No. 220, merely instructs the jury that it must consider only the evidence presented at trial in determining whether the People have met their burden of proof. In other words, this instruction informs the jury that the People may not meet their burden of proof based on evidence other than that offered at trial. The instruction does not tell the jury that it may not consider any perceived lack of evidence in determining whether there is a reasonable doubt as to a defendant's guilt. Further, the remainder of the instructions clearly conveyed to the jury the notion that the People had the burden of proving Westbrooks's

guilt beyond a reasonable doubt and that the jury was required to determine whether the People had met their burden of proving all of the facts essential to establishing his guilt.

We reject Westbrook's argument that *People v. McCullough* (1979) 100 Cal.App.3d 169 (*McCullough*), supports his claim. In *McCullough*, after the jury asked a question regarding one of the elements of the charged offense, the trial court reconvened the jury and invited other questions from the jurors. (*Id.* at p. 180.) While the court was discussing the concept of reasonable doubt with the jury, one juror asked, "So then the doubt must arise from evidence?" (*Id.* at p. 181.) The trial court responded:

"Well, I would answer that yes, if you are saying-if your question is — what is reasonable doubt — reasonable doubt is that state of the case which, after a comparison and consideration of all of the evidence — that is the evidence introduced in the trial — after a comparison and consideration of all of the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge." (*Ibid.*)

The *McCullough* court concluded that the trial court had "misled" the jury by telling it that the "doubt must arise from the evidence," because reasonable doubt may arise from the lack of evidence in a case. (*Id.* at p. 182.)

Unlike in *McCullough*, the trial court in this case did not tell the jury that reasonable doubt must arise from the evidence presented at trial, and, given the court's other instructions, it would not have been reasonable for the jury to interpret CALCRIM No. 220 as stating that the jury was precluded from considering any perceived lack of

evidence in determining Westbrooks guilt.¹⁰ (See *Victor*, *supra*, 511 U.S. at pp. 22-23 [rejecting defendant's argument that reasonable doubt instruction violated constitutional rights where there was "no reasonable likelihood that the jurors . . . applied the instructions in a way that violated the Constitution"].)

Accordingly, we conclude that in instructing the jury pursuant to CALCRIM No. 220, the trial court did not violate Westbrooks's due process right to have his guilt determined beyond a reasonable doubt. In light of our conclusion that the trial court did not err in instructing the jury pursuant to CALCRIM No. 220, we conclude that defense counsel was not ineffective for failing to object to the trial court's giving of the instruction. (See *People v. Slaughter* (2002) 27 Cal.4th 1187, 1222 [finding no ineffective assistance where defense counsel reasonably could have concluded that requesting jury instruction would have been futile].)¹¹

¹⁰ We thus need not consider the effect of the fact that, in this case, there *was* evidence regarding the lack of physical evidence indicating that Westbrooks committed the offense, in the form of Officer Chavez's testimony regarding the fact that Westbrooks had neither drugs nor the marked \$20 bill in his possession when he was arrested.

¹¹ While this appeal was pending, the court, in *People v. Rios* (2007) ____ Cal.App.4th ____, 2007 WL 1629908, *1-2, rejected a defendant's claim that "language in CALCRIM 220 . . . requiring the jury 'to compare and consider all the evidence' impermissibly shifts the burden of proof to the defense by allowing the jury to hold against the defense the absence of defense evidence." *Rios* is consistent with our opinion in this case.

B. *The trial court did not abuse its discretion in refusing to strike Westbrook's prior strike conviction*

Westbrook claims that the trial court abused its discretion in denying his motion to strike his prior strike conviction for attempted robbery.

1. *Factual and procedural background*

Prior to sentencing, Westbrook filed a motion requesting that the court strike a 1993 conviction for attempted robbery. Westbrook argued that the circumstances of the prior offense supported striking the conviction. He claimed that he had agreed to be the driver and lookout while three other individuals robbed a restaurant. The robbery was aborted and never took place. Westbrook claimed the strike was for a "non-violent" offense, and that his role in the offense had been "minimal." He also noted that the strike conviction had occurred approximately 12 years earlier. Westbrook also claimed that the circumstances of the present offense supported striking the prior strike, arguing that it was "a simple hand to hand transaction of a small amount of cocaine base."

With respect to his criminal history, Westbrook argued that most of his offenses stemmed from his troubled youth, which "he ha[d] recently come to terms with." Westbrook also noted that his more recent offenses were related to his addiction to marijuana, and that he was actively seeking help for this addiction. Westbrook asserted that his adult criminal history did not reveal any "violent acts against the person of another."

With respect to his character and prospects, Westbrook noted that he had renounced criminality, had a supportive family, and had demonstrated a willingness to

earn a living. Westbrook supported his motion to strike with letters from his mother, wife, and sister-in-law. The letters stated that Westbrook had numerous redeeming qualities and that he was, in the words of his mother, "an asset to his family and community."

At Westbrook's sentencing hearing, defense counsel reiterated the arguments made in the motion to strike. Westbrook's wife addressed the court and stated that Westbrook had been a positive force in her life and the life of her family. She asked the court to show mercy and to strike Westbrook's prior strike. The People reviewed Westbrook's criminal history and requested that the court deny Westbrook's motion.

In ruling on Westbrook's motion, the trial court stated that it had reviewed a prior probation report from 1993 that discussed the circumstances of the 1993 attempted robbery. The court stated that the circumstances of the strike offense indicated that Westbrook had agreed to assist "other folks in a strong arm robbery with a weapon to get employees into a position of being taken as hostages basically to take the money from a restaurant" The court stated that this was "an extraordinarily serious crime."

The trial court further noted that there had not been a significant change in Westbrook's behavior since he became involved with the juvenile justice system at the age of 13. The court noted that Westbrook had a lengthy juvenile record, and a lengthy adult criminal record for drug sales. The court also noted that in May 2005, Westbrook had engaged in threatening conduct toward a police officer who was attempting to issue him a traffic ticket. Further, Westbrook had suffered a 1999 conviction for battery, which indicated a willingness to commit violence. The trial court acknowledged that

Westbrooks had redeeming qualities, as attested to by his wife. However, the court found that Westbrooks was not outside the spirit of the Three Strikes law and refused to strike the strike.

2. *Governing law*

In considering whether to strike a defendant's prior strike conviction, a trial court is required to consider whether, given "the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*).)

Our standard of review of the trial court's decision is well established:

"A trial court's decision to strike prior felony convictions is subject to review under the 'deferential abuse of discretion standard. Under that standard an appellant who seeks reversal must demonstrate that the trial court's decision was irrational or arbitrary. It is not enough to show that reasonable people might disagree about whether to strike one or more of his prior convictions. Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance. [Citation.]' [Citation.]" (*People v. Romero* (2002) 99 Cal.App.4th 1418, 1434.)

Applying this standard, courts have frequently affirmed trial court's decisions not to strike prior strikes in cases in which the defendant has a lengthy criminal history. In *People v. Strong* (2001) 87 Cal.App.4th 328, 338 (*Strong*), the court reviewed this case law and noted, "Following *Williams, supra*, 17 Cal.4th 148, the overwhelming majority

of California appellate courts have reversed the dismissal of, or affirmed the refusal to dismiss, a strike of those defendants with a long and continuous criminal career." (See *Strong, supra*, 87 Cal.App.4th at p. 338 ["extraordinary must the circumstance be by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack"].)

3. *The trial court did not abuse its discretion in denying Westbrook's motion to strike his prior attempted robbery conviction*

Considering the *Williams* factors, while the nature and circumstances of the present felony conviction were not particularly aggravated, the selling of cocaine base is not a trivial crime. With respect to the prior strike offense, Westbrook was involved a plan to rob a restaurant with three other persons. We agree with the trial court that this was a very serious offense.

Westbrook's criminal history is lengthy. Westbrook committed numerous offenses as a juvenile. While at juvenile facilities, Westbrook exhibited "violent outbursts" and a tendency to threaten staff members. As an adult, in addition to the 1993 strike, Westbrook suffered a 1989 conviction for escape from a juvenile facility (Welf. & Inst. Code § 871, subd. (b)),¹² a 1995 conviction for possessing marijuana for sale (Health & Saf. Code § 11539), a 1999 for battery upon a spouse (§ 242, 243, subd.

¹² Westbrook turned 18 while this matter was pending and his case was referred to adult court for prosecution.

(e)(1)), a 2000 conviction for fighting in a public place (§ 415),¹³ a 2000 conviction for possession of a controlled substance (Health & Saf. Code § 11377 subd. (a)), and a 2005 conviction for resisting a peace officer (§ 148). Further, as an adult, Westbrooks was granted probation on three occasions. In each case, he violated probation.

In considering Westbrooks's "background, character, and prospects" (*Williams, supra*, 17 Cal.4th at p. 161), the record indicates that Westbrooks suffered sexual and physical abuse as a child. He has had a longstanding problem with the use of marijuana, but has participated in substance abuse treatment programs in an attempt to address this issue. Letters submitted on Westbrooks's behalf by his family members and his wife's testimony at his sentencing hearing indicate that Westbrooks has redeeming characteristics. He has been involved in the rearing of children, has maintained various jobs, and has taken steps to attempt to overcome abuse that he has suffered.

After considering the *Williams* factors, we conclude the trial court did not abuse its discretion in denying Westbrooks's motion to strike his prior strike conviction for attempted robbery.

¹³ During the sentencing hearing the trial court accepted defense counsel's representation that the "fighting in a public place," conviction was a "classic marijuana charge that got [pled] to a non-drug charge of disturbing the peace."

IV.
DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

AARON, J.

WE CONCUR:

BENKE, Acting P. J.

HUFFMAN, J.